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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-647

STATE OF CALIFORNIA,

Petitioner,

vs.

LESLIE FOREMAN,

Respondent.

Respondent's Opposition to Petition for Writ of Certiorari.

Certiorari should be denied because this case falls under "the settled rule that where a judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [this Court's] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller,* (1935) 296 U.S. 207, 210.

It is clear that the California Supreme Court in *People v. Superior Court (Hawkins),* (1972) 6 Cal.3d 757, upon which the Court below relied, held the practice here invalid under California law.

I.

The Decision in People v. Superior Court (Hawkins) Supra, Is Based on California Vehicle Code Section 13353.

In *Hawkins, supra,* the California Supreme Court stated:

> "We find it instructive at this point to consider the legislative purpose underlying the California 'implied consent' law (Veh. Code Section 13353.)[6]

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[6]Section 13353, subdivision (a) provides: "(a) Any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, breath or urine for the purpose of determining the alcoholic content of his blood *if lawfully arrested* for any offense allegedly committed while the person was driving a motor vehicle under the influence of intoxicating liquor. The *test shall be incidental to a lawful arrest* and administered at the direction of a peace officer having reasonable cause to believe such person was driving a motor vehicle upon a highway while under the influence of intoxicating liquor. Such person shall be told that his failure to submit to or complete such a chemical test will result in the suspension of his privilege to operate a motor vehicle for a period of six months.

"The person arrested shall have the choice of whether the test shall be of his blood, breath or urine, and he shall be advised by the officer that he has such choice. If the person arrested either is incapable, or states that he is incapable, of completing any chosen test, he shall then have the choice of submitting to and completing any of the remaining tests or test, and he shall be advised by the officer that he has such choice.

"Such person shall also be advised by the officer that he does not have the right to have an attorney present before stating whether he will submit to a test, before deciding which test to take, or during administration of the test chosen.

"Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn his consent and such tests

"Although it is clear under *Schmerber* that a person who has been lawfully arrested may have a blood sample forcibly removed without his consent, provided it is done in a reasonable, medically approved manner, and provided further that the arresting officer had probable cause to believe the arrestee was intoxicated, nevertheless such an episode remains an unpleasant, undignified and undesirable one. . . .

The effect of this legislation is to equip peace officers with an instrument of enforcement not involving physical compulsion. It is noteworthy that in so doing, the Legislature took pains to condition its use upon a lawful arrest for driving under the influence of intoxicating liquor and upon the reasonable belief of the peace officer that the arrestee was in fact so driving." 6 Cal.3d 764-765.

Thus it is clear that the California Legislature has dealt comprehensively with the problem of obtaining chemical tests from persons suspected of driving under the influence of intoxicating liquors. And the California Supreme Court has recognized that the program enacted by the legislature is not to be superseded by "Highway Patrol policies". [Petition for Writ of Certiorari, p. 5.]

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may be administered whether or not such person is told that his failure to submit to or complete the test will result in the suspension of his privilege to operate a motor vehicle."

II.

The Decision in People v. Superior Court, Supra, Is Based on California Decisional Law Interpreting Article I, Section 19 of the California Constitution. (See Woolfe v. Colorado, 338 U.S. 535, 93 L.Ed. 1782, 69 S.Ct. 1359.)

In the opinion of the California Supreme Court in *People v. Superior Court (Hawkins), supra,* equal emphasis is placed on the decision of this Court in *Schmerber v. California,* (1966) 384 U.S. 757, 16 L. ed.2d 908, 86 S.Ct. 1826 holding that a blood test taken *incident to a valid arrest* did not violate the Fourth Amendment of the Federal Constitution and the case of *People v. Duroncelay,* (1957) 48 Cal.2d 766, 312 P.2d 690 holding that the taking of a blood sample *incident to lawful arrest* did not violate the defendant's rights.

In *Duroncelay, supra,* the majority opinion held that the taking of a blood sample incident to a lawful arrest did not constitute "an unreasonable search and seizure in violation of his [defendant's] constitutional rights" without specifying whether it was referring to the federal or state constitution or both.

The California Supreme Court however, did distinguish *Duroncelay* from *Breithaupt v. Abram,* (1957) 352 U.S. 432, 77 S.Ct. 408, 1 L.ed.2d 448 as being disposed of on the law of New Mexico, 48 Cal.2d at 771. And the court specifically relied on its earlier decision of *People v. Cahan,* 44 Cal.2d 434, 282 P.2d 905 which, prior to *Mapp v. Ohio,* (1961) 367 U.S. 643, 6 L.ed.2d 1081, 81 S.Ct. 1684 held evidence obtained in violation of either the Fourth Amendment to the Federal Constitution or Article I, Sec-

tion 19 of the California Constitution to be inadmissible in this state. 44 Cal.2d at 445.

Further indication that *Duroncelay* was decided on state grounds is the dissent of Mr. Justice Carter in that case:

> "I was of the opinion there [Peo v. Haeussler, 41 Cal.2d 252, 260 P.2d 8,] as I am here, that the taking of such a blood sample for the purpose of obtaining evidence to be used against the non consenting person is both a deprivation of due process and an unreasonable search and seizure in violation of *both the federal and state Constitutions.*" 48 Cal.2d at 773. (Emphasis supplied.)

It is unlikely in the light of this dissent that the majority of the California Supreme Court failed to consider the California Constitution in *Duroncelay.*

Conclusion.

It is settled law that this court will not review questions of state law. *Minnesota v. National Tea Co.,* (1940) 309 U.S. 551, 84 L.ed. 920; *State Tax Commission v. Van Cott,* (1939) 306 U.S. 511; *Mental Hygiene Dept. v. Kirchner,* (1965) 388 U.S. 194.

The petition for writ of certiorari should be denied.

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